

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD ALLAN CASE,)
Petitioner,) CASE NO. C12-0187-MJP-MAT
v.)
MAGGIE MILLER-STOUT,) REPORT AND RECOMMENDATION
Respondent.)

INTRODUCTION

Petitioner Richard Allan Case proceeds pro se in this habeas corpus matter pursuant to 28 U.S.C. § 2254. Petitioner is in custody pursuant to a 2006 conviction for murder in the second degree and was sentenced to 180 months confinement.

Petitioner filed a habeas petition in February 2012. (Dkt. 4.) The undersigned, with consideration of the petition, an amended answer (Dkt. 31), and state court record (Dkts. 15 & 32 (exhibits 1-74)), issued a Report and Recommendation recommending dismissal of two grounds for relief raised in the petition. Upon review, United States District Judge Marsha J.

01 Pechman issued an Order Adopting Report and Recommendation with Amendment, with the
 02 amendment addressing and finding not ripe for consideration a claim of ineffective assistance
 03 of counsel on direct appeal, and entered a judgment. (Dkts. 55 & 56.)

04 Judge Pechman thereafter granted a motion to alter or amend the judgment with
 05 consideration of the new or newly clarified ineffective assistance of counsel claim and its effect
 06 on the disposition of the case. (Dkt. 58.) The undersigned directed respondent to submit a
 07 supplemental amended answer and provided plaintiff the opportunity to submit a response.
 08 (Dkt. 59.) Respondent submitted a supplemental answer (Dkt. 61) and supplemental state
 09 court records (Dkts. 65 & 66 (exhibits 75-89)). After initially seeking an extension of time to
 10 respond, petitioner filed an amended petition. (Dkt. 69.) Respondent submitted an answer to
 11 the amended petition (Dkt. 70), to which petitioner submitted a reply (Dkt. 72).

12 Petitioner's amended petition raises eight grounds for relief. (*See* Dkt. 69.) The Court
 13 has reviewed the record in its entirety.¹ For the reasons discussed herein, the Court
 14 recommends petitioner's amended habeas petition be DENIED without an evidentiary hearing,
 15 and this action DISMISSED.

16 BACKGROUND

17 A. Counsel Prior to Trial

18 Petitioner was initially assigned two attorneys to represent him at trial. He sought, but
 19 was denied substitution of counsel in May 2003. (Dkt. 65, Ex. 76.) In December 2003, the

20 1 As previously noted, while the Washington Court of Appeals could not locate the folder
 21 containing correspondence, pleadings, and orders in petitioner's direct appeal, respondent provided a
 22 copy of the state court docket and some of the relevant documents obtained from court files in other
 cause numbers. Respondent did not submit the more than seventy volumes of trial transcripts upon
 determining they were not relevant to the resolution of petitioner's claims. As before, the Court agrees
 with respondent that the record submitted is sufficient to reach a determination in this case.

01 trial court granted both a motion to substitute counsel and a motion to withdraw after petitioner
 02 filed bar complaints and a civil rights lawsuit against his attorneys. (*Id.*, Exs. 77-78.) While
 03 finding, “in terms of investigation, diligence, preparation, . . . no basis to find ineffective
 04 assistance of counsel[,]” the trial court allowed for withdrawal and substitution due to the
 05 “irreconcilably bad relationship” between petitioner and counsel. (*Id.*, Ex. 78 at 59-62.)

06 The court reassigned counsel. As before, petitioner moved for substitution and
 07 pursued legal action against his attorney. (*Id.*, Ex. 79 at 8-26; *see also id.*, Ex. 80 at 5-6 and
 08 Dkt. 16, Ex. 5 at 1.) In July 2004, the trial court again granted a motion to substitute counsel,
 09 “not because of ineffective assistance but because of a breakdown in communication and an
 10 inability to continue[.]” (Dkt. 65, Ex. 79 at 33.) The judge warned petitioner his pattern of
 11 behavior could result in forfeiture of his right to counsel, engaged in an extensive discussion
 12 with petitioner about self-representation at trial, and found petitioner understood “the
 13 consequences and dangers of self-representation.” (*Id.* at 21-62.) The Judge also advised that
 14 if petitioner, in bad faith, caused another conflict of interest or communications breakdown
 15 preventing further representation by newly appointed counsel, he would find petitioner
 16 knowingly, intelligently, and voluntarily forfeited his right to an appointed attorney. (*Id.* at
 17 62-63.)

18 The court again assigned new counsel. In March 2005, petitioner moved to discharge
 19 counsel and to represent himself at trial. (*Id.*, Ex. 80.) The judge sought clarification from
 20 petitioner as to whether he was asking for substitution of new counsel or seeking to proceed pro
 21 se, to which petitioner responded:

22

I am seeking to go pro se, Your Honor, and if you don't rule in my favor, then I've already got a bar complaint and a skeleton lawsuit that is filed against [my current counsel]. I am going to do whatever it takes to be designated pro se by this Court.

(*Id.* at 7.) The judge explained the difference between substitution of counsel, forfeiture of counsel, and a request for self-representation. (*Id.* at 8-13.) When asked if he wanted a ruling on a motion to substitute counsel, petitioner answered: "No." (*Id.* at 13.) When asked if he was withdrawing his motion for substitution, petitioner answered: "My motion is to proceed pro se." (*Id.* at 14.) The judge also asked petitioner whether he understood a request to proceed pro se meant giving up his "right to be represented by any attorney, [his current counsel] or anybody else in the telephone directory[,]" resulting in the following exchange:

Mr. Case: Um hum.

Judge Mattson: Is that what you want to do?

Mr. Case: My position is I need to do whatever it takes for me to take control of my case. So, I mean, if I can waive my right to counsel, proceed on my case pro se, then that is what I am willing to do, but my position is if I am denied the right to waive counsel and proceed pro se, then I will effectively pursue the bar complaint and the - - .

Judge Mattson: As a way to forfeit (inaudible) hand.

Mr. Case: Yes, sir. I mean, that is the truth of the matter there.

(*Id.* at 14.) (*See also id.* at 15 (petitioner stated it was "absolutely" his position that he wanted to handle his case on his own).) The judge engaged in a lengthy colloquy with petitioner, explaining petitioner's rights, the consequences of the waiver of counsel, and the dangers and potential pitfalls of self-representation, and ultimately concluded petitioner voluntarily and intelligently made a valid waiver of counsel. (*Id.* at 17-48.) (*See also Dkt. 16, Ex. 2 at*

01 "Exhibit 'K'" (order granting motion to proceed pro se: "The court finds the waiver to be
 02 knowing, intelligent & voluntary.")) Petitioner thereafter proceeded pro se, with his last
 03 attorney assigned as standby counsel for the trial. (*See* Dkt. 65, Ex. 81 at 3.)

04 B. Motions for Interlocutory Review of Prejudgment Rulings

05 In September 2005, petitioner sought interlocutory review of the trial judge's pretrial
 06 orders denying his motion for sanctions and his motion to dismiss the charges. (Dkt. 16, Exs.
 07 1-4.) The Washington Court of Appeals found the trial court did not commit an obvious or
 08 probable abuse of discretion and denied review. (*Id.*, Ex. 5.) The court also denied
 09 petitioner's motion to modify the ruling. (*Id.*, Exs. 6-8.) Petitioner did not seek further
 10 review and the Court of Appeals issued a certificate of finality. (*Id.*, Ex. 9.)

11 In November 2005, petitioner again sought interlocutory review of an order denying a
 12 motion to dismiss under the speedy trial rule. (*Id.*, Exs. 10-12.) Because the trial court
 13 entered the judgment and sentence before the motion could be heard, the Commissioner of the
 14 Court of Appeals denied the motion as moot, noting petitioner could raise the issue in his
 15 appeal. (*Id.*, Ex. 13.) Petitioner filed and the Washington Supreme Court denied a motion to
 16 modify the ruling. (*Id.*, Ex. 14-15.) Following the issuance of a certificate of finality and the
 17 filing of a motion to recall, the Court of Appeals denied the motion and petitioner sought
 18 review. (*Id.*, Exs. 16-19.) The Washington Supreme Court denied review. (*Id.*, Exs. 20-22.)

19 Petitioner also, in December 2005, sought discretionary review of an oral ruling of the
 20 superior court. (*Id.*, Ex. 23.) The Court of Appeals directed petitioner to obtain a written
 21 order for review and, when a written order was not provided, denied review. (*Id.*, Exs. 24-26.)
 22 Petitioner did not seek further review and the court issued a certificate of finality. (*Id.*, Ex. 27.)

01 Finally, in March 2006, petitioner sought interlocutory review of several superior court
 02 orders. (*Id.*, Ex. 28.) The appellate court directed petitioner to pay the filing fee or move for
 03 an order of indigence, as well as to move for an extension of time to pursue the untimely
 04 request for interlocutory review. (*Id.*, Ex. 29.) Upon petitioner's failure to comply with those
 05 instructions, the court dismissed the motion for interlocutory review, and the Court of Appeals
 06 issued a certificate of finality. (*Id.*, Exs. 30-31.)

07 C. Direct Appeal

08 The jury convicted petitioner of second degree murder. (Dkt. 65, Ex. 75.) On July 7,
 09 2006, the court held a sentencing hearing, entered the sentence, and informed petitioner of his
 10 rights on appeal. (*Id.*, Ex. 81 at 48-55). As to counsel, the trial judge stated:

11 . . . I don't know where you stand on the position of being represented by
 12 counsel, for purposes of an appeal, but just as in the trial, if you cannot afford
 13 counsel, you have the right to have counsel appointed and have portions of the
 trial record necessary for review of assigned errors transcribed at public expense
 for an appeal.

14 (*Id.*, Ex. 81 at 53-54.) On that same day, petitioner filed a notice of appeal pro se. (Dkt. 66,
 15 Ex. 83.)

16 The following month, in a hearing addressing several post-conviction motions
 17 petitioner filed pro se, the judge asked whether petitioner was intending to represent himself on
 18 appeal, and he replied: "So far." (Dkt. 65, Ex. 82 at 14.) The prosecutor noted appellate
 19 counsel could be assigned and the judge stated petitioner "might be well served by appellate
 20 counsel" in relation to the record for the appeal. (*Id.* at 14-16.)

21 Petitioner continued to represent himself pro se on appeal. He filed a "Notice of
 22 Appearance Pro Se" and a letter regarding "Order of Indigency/Notice of Appearance Pro Se."

01 (Dkt. 66, Exs. 84-85.) In October 2006, petitioner requested an order from the superior court
 02 directing the Department of Corrections to provide him with materials “to prosecute an appeal
 03 while pro se[,]” and asserted his constitutional right to represent himself. (Dkt. 16, Ex. 32.)
 04 Responding to the request for an order of indigency, the court acknowledged petitioner’s
 05 decision to proceed pro se on appeal, stating:

06 The stay is lifted and the filing fee is waived. The Clerk shall issue a perfection
 07 schedule based on the date of this ruling. Mr. Case shall be allowed to proceed
 08 pro se. However, there is no constitutional right to proceed [pro se] on appeal
 09 and Mr. Case’s status as a pro se litigant may be reviewed in the event he cannot
 10 proceed pro se.

11 (Dkt. 66, Ex. 86.)

12 In January 2007, the court again took note of petitioner’s decision to proceed pro se:

13 Appellant has made very clear in the litigation at the trial court level that he does
 14 not wish to be represented by counsel; although he qualifies for appointed
 15 counsel on appeal, he omitted appointment of counsel from the order of
 16 indigency he prepared for the trial court’s signature. He has been advised that
 17 an appellant does not have a constitutional right to represent himself on appeal,
 18 yet the court would like to respect his wishes as much as possible. . . .

19 (Id., Ex. 87.) However, given petitioner’s apparent difficulty in perfecting the record for
 20 appeal, the Court appointed appellate counsel for the limited purpose of preparing the record.

21 (Id.) The Court entered an order appointing counsel and clarified: “Once the case is ready,
 22 the appointment will cease and appellant Richard Case will be responsible for briefing and
 23 compliance with all future appellate court deadlines.” (Id., Ex. 88; *accord* Dkt. 16, Ex. 46 at
 24 14-15.)

25 As of July 19, 2007, the case was deemed “record ready.” (Dkt. 16, Ex. 46 at 10.) The
 26 appellate court file contained over seventy volumes of transcripts and over 3,000 pages of

01 clerk's papers. (*See id.* at 10, 13.)

02 By letter dated October 3, 2007, the clerk of the Court of Appeals addressed a pending
 03 motion for extension of time to file petitioner's appellant brief, noting the record had been ready
 04 since July 19, 2007 and appellant's brief had been due as of September 4, 2007. (*Id.*, Ex. 47.)
 05 The court granted petitioner a sixty-day extension, to November 5, 2007, to file his brief, and
 06 stated: "No further extensions should be anticipated." (*Id.*) The court nonetheless granted
 07 petitioner further extensions of time, until January 16, 2008 and March 21, 2008, for the filing
 08 of his brief. (*Id.*, Ex. 46 at 7-8.)

09 Petitioner failed to meet his filing deadlines and, instead, moved to "order record to be
 10 completed[.]" (*Id.* at 7.) By Order dated May 30, 2008, the Court of Appeals directed
 11 petitioner to submit a concise list, within thirty days of the order, identifying the items he
 12 believed were missing from the record. (*Id.*, Ex. 48.) The court indicated that, upon
 13 submission of a list, counsel would be reappointed for the purpose of determining the existence
 14 of any additions to the record, but that, if petitioner failed to submit a list, his motion would be
 15 denied and the record deemed complete. (*Id.*) The appellate docket reflects that, as of June
 16 30, 2008, petitioner had not submitted a list of missing records to the court. (*Id.*, Ex. 46 at 6
 17 (docket entry reflecting due date for submission of list states "Not filed").) He, instead, sought
 18 discretionary review of the appellate court order by the Washington Supreme Court. (*Id.*, Ex.
 19 49.) In so doing, petitioner asserted his pro se status and argued the reappointment of counsel
 20 to address the perfection of the record violated his right to self-representation. (*Id.*) (*See also id.*, Appx. 7 ("I have exercised my right to self-representation (pro se) since March 2005. I
 22 elected to prosecute my appeal as pro se and filed my first 'Notice of Appeal' in June, 2006."))

01 He “ardently oppos[ed]” the reappointment of counsel and, at most, requested the appointment
 02 of a “conflict-free local paralegal to assist in reconstructing the record[.]” (*Id.*, Ex. 49 at 7, 14.)
 03 The Commissioner of the Supreme Court denied review, stating petitioner’s “suggestion that
 04 counsel have already proved inadequate to the task [of perfecting the record] is unpersuasive, as
 05 is his apparent claim that counsel’s interest and his now conflict.” (*Id.*, Ex. 50.) Petitioner
 06 moved to modify the ruling, attaching a grievance he filed with the Washington State Bar
 07 Association regarding the performance of the attorney assigned to assist with perfecting the
 08 record for his appeal. (*Id.*, Ex. 51.) The Supreme Court denied the motion. (*Id.*, Ex. 52.)

09 The Court of Appeals continued to grant numerous extensions of time to allow for the
 10 filing of petitioner’s opening brief: (1) on February 24, 2009, the court extended the deadline
 11 to May 1, 2009; (2) on May 14, 2009, the court extended the deadline to June 1, 2009; (3) on
 12 June 9, 2009, the court extended the deadline to July 1, 2009; (4) on July 28, 2009, the court
 13 extended the deadline to August 31, 2009; and (5) on October, 12, 2009, the court extended the
 14 deadline a final thirty days. (*Id.*, Ex. 46 at 3-5.) (*See also* Dkt. 66, Ex. 89 (July 28, 2009 order
 15 outlining history of extensions).) In the October 2009 order, the court ruled that petitioner’s
 16 appeal would be dismissed unless he filed his opening brief by the conclusion of the thirty-day
 17 deadline. (Dkt. 16, Ex. 46 at 3.) When petitioner failed to meet that deadline, the Clerk of the
 18 Court of Appeals, on November 24, 2009, dismissed the appeal. (*Id.*, Ex. 53.) Petitioner did
 19 not move to modify the ruling (*see id.*, Ex. 46 at 2), and, on December 30, 2009, the Court of
 20 Appeals issued a mandate (*id.*, Ex. 54).

21 In November 2009, petitioner moved for an extension of time to file a motion for
 22 discretionary review. (*Id.*, Ex. 55.) The Clerk of the Washington Supreme Court denied the

01 motion that same month. (*Id.*, Ex. 56.) Petitioner moved to modify the Clerk's ruling, but the
 02 court, in December 2009, deemed the filing untimely and took no action. (*Id.*, Exs. 57 & 58.)

03 In January 2011, petitioner filed a motion for recall of the mandate issued a year earlier.
 04 (*Id.*, Ex. 46 at 2.) The court denied the motion. (*Id.* at 1.) Petitioner, in March 2011,
 05 petitioned the Washington Supreme Court for review. (*Id.*, Ex. 59.) In his motion, petitioner
 06 again asserted his "guaranteed right to self-representation on appeal[,"] but also argued there
 07 was no colloquy on record establishing his voluntary, knowing, and intelligent waiver of his
 08 right to counsel. (*Id.* at 2, 4-5, 11-13 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938))). The
 09 Supreme Court denied the request for review (*id.*, Exs. 60-62), and, on August 8, 2011, denied a
 10 motion to modify the ruling (*id.*, Exs. 63-64).

11 D. Post-Conviction Collateral Challenges

12 As stated above, petitioner filed an October 2006 motion in superior court requesting an
 13 order directing the Department of Corrections to provide him with materials to litigate his
 14 appeal. (Dkt. 16, Ex. 32.) The superior court transferred the motion to the court of appeals
 15 for consideration as a personal restraint petition, and the appellate court found no basis for
 16 relief. (*Id.*, Ex. 35.) Petitioner filed a motion for discretionary review, which the Washington
 17 Supreme Court denied. (*Id.*, Exs. 36 & 39.) Subsequently, the Washington Supreme Court
 18 denied a motion to modify its ruling, whereupon the Court of Appeals issued a certificate of
 19 finality dated August 29, 2008. (*Id.*, Exs. 40-42.)

20 Petitioner also, in March 2008, filed a petition for writ of mandamus in the Washington
 21 Supreme Court. (*Id.*, Ex. 43.) The court construed the filing as a motion for expenditure of
 22 public funds and denied the motion. (*Id.*, Exs. 44 & 45.)

In July 2009, petitioner filed motions in superior court seeking to vacate his judgment and to be transported to superior court, and filed a motion in the Court of Appeals seeking leave to allow the superior court to consider his motion to vacate. (*Id.*, Exs. 65-66 & 69.) The superior court denied the motion for transport pending a decision from the Court of Appeals. (*Id.*, Exs. 67-68.) The Commissioner of the Court of Appeals deemed unnecessary and denied petitioner's motion for permission for the superior court to consider his motion, and further denied a request to stay petitioner's direct appeal. (*Id.*, Ex. 70.) The Commissioner stated:

This appeal has now been pending for more than 3 years and there is no good reason to further delay it. Because Case indicated on two previous occasions that his brief was almost finished and now seeks an indefinite stay without mentioning the brief, it appears as if he is merely delaying the matter.

(*Id.*) The Court of Appeals thereafter denied a motion to modify the Commissioner's ruling. (*Id.*, Exs. 71-72.) It appears petitioner did not further prosecute his post-conviction motion to vacate and that the superior court did not enter an order disposing of that motion.

DISCUSSION

Petitioner raises eight grounds for relief in his amended petition:

1. Petr is in custody in violation of his equal protection right to not be deprived of liberty w/o due process of law as guaranteed under 14th Am & 28 USC § 2241-43 & 2254. The criminal process provided by the State has deprived petr a full & fair opportunity to litigate his fed. claims & properly exhaust state remedy.

2. Petr is in custody in violation of the 14th Am to not be deprived of liberty w/o due process of law. Petr is entitled to habeas relief because incriminating statements made during custodial interrogation were recorded & admitted at trial in violation of the rules set forth in *Miranda v. Az*, *Michigan v. Mosley* & *Edwards v. Az*. Accord, 5th Am., 6th Am.

3. Petr is in custody in violation of right to not be deprived of liberty to

01 habeas relief because the statements gathered by Kent Police on 1/18 &
02 1/21/2003 were unconstitutionally obtained & admitted in trial in violation of
03 the rules set forth in Brown v. Ill., Taylor v. Ala, Dunaway v. N.Y., Lanier v. S.
04 Carolina, Gerstein v. Pugh, McLaughlin & Wong Sun., Franklin v. Delaware,
05 (4th Am).

06 4. Petr is in custody in violation of 14th Am right to not be deprived of
07 liberty w/o due process of law. Petr claims that illegally seized evidence
08 (automobile, RX-7) was used in trial to obtain an unconstitutional conviction in
09 violation of the rules set forth in Marron v. U.S., Wong Sun, Mapp v. Ohio,
10 Silverthorne, Hayes v. Florida, Florida v. Roger & Franks v. Del. (4th Am).

11 5. Petr is in custody in violation of 14th Am right not to be deprived of
12 liberty w/o due process. Petr's Faretta waiver was invalid as it was not
13 voluntary, but based on receiving ineffective assistance of counsel for over 2
14 yrs, and the denial of the right to a speedy trial. Petr is in custody in violation of
15 the rules set forth in Johnson v. Zerbst, Faretta, Strickland & Barker v. Aker,
16 OK, Wingo (Accord 6th Am).

17 6. Petr is in custody in violation of 14th Am right to not be deprived of
18 liberty w/o due process of law. Petr's conviction is unconstitutional as it is
19 based upon the violation of petr's right to counsel and in violation of the rules set
20 forth in Johnson v. Zerbst & Gideon v. Wainwright & progeny. Accord, 6th
21 Am. & McKaskle v. Wiggins.

22 7. Petr is in custody in violation of 14th Am right to not be deprived of
23 liberty w/o due process of law. Petr has been deprived of his right to appeal,
24 w/counsel as clearly established by Douglas v. California, Anders v. California,
25 & Penson v. Ohio.

26 8. Petr is in custody in violation of 14th Am right to not be deprived of
27 liberty w/o due process of law. Petr has been deprived of his right to receive a
28 direct appeal w/o invidious discrimination & w/o unreasoned distinction in
29 violation of the rules set forth in Griffin v. Illinois & progeny. Accord 5th &
30 6th Ams.

31 (Dkt. 69 at 5-15.)

32 Respondent argues petitioner failed to exhaust claims two through six and that those
33 claims are now procedurally barred and defaulted. Respondent alternatively argues that
34 claims three through six lack merit regardless of whether they are exhausted and/or

01 procedurally barred. Respondent further argues that claims one and eight lack merit as
 02 previously found by this Court, and that claim seven likewise lacks merit. For the reasons set
 03 forth below, the Court agrees with respondent and recommends habeas relief be denied and this
 04 matter dismissed.

05 A. Exhaustion

06 “An application for a writ of habeas corpus on behalf of a person in custody pursuant to
 07 the judgment of a State court shall not be granted unless it appears that . . . the applicant has
 08 exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). The
 09 exhaustion requirement “is designed to give the state courts a full and fair opportunity to
 10 resolve federal constitutional claims before those claims are presented to the federal courts,”
 11 and, therefore, requires “state prisoners [to] give the state courts one full opportunity to resolve
 12 any constitutional issues by invoking one complete round of the State’s established appellate
 13 review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

14 In order to provide the state courts with the requisite “opportunity” to consider his
 15 federal claims, a prisoner must “fairly present” his claims to each appropriate state court for
 16 review, including a state supreme court with powers of discretionary review. *Baldwin v.*
17 Reese, 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995), and
 18 *O’Sullivan*, 526 U.S. at 845). *Accord James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994) (complete
 19 round of the state’s established review process includes presentation of a petitioner’s claims to
 20 the state’s highest court). Additionally, a petitioner must “alert the state courts to the fact that
 21 he was asserting a claim under the United States Constitution.” *Hiivala v. Wood*, 195 F.3d
 22 1098, 1106 (9th Cir. 1999) (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). “The mere

01 similarity between a claim of state and federal error is insufficient to establish exhaustion.” *Id.*
 02 (citing *Duncan*, 513 U.S. at 366). “Moreover, general appeals to broad constitutional
 03 principles, such as due process, equal protection, and the right to a fair trial, are insufficient to
 04 establish exhaustion.” *Id.* (citing *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)).

05 Petitioner did not fairly present any claims to the state courts for their consideration on
 06 direct appeal. Instead, his appeal was dismissed given his failure to file an opening brief.
 07 Nor, as petitioner concedes (*see* Dkt. 72 at 10), did he present grounds two through six to the
 08 Washington Supreme Court in a post-conviction collateral challenge. The Court, therefore,
 09 agrees with respondent that petitioner failed to exhaust grounds two through six by fairly
 10 presenting those claims to the state courts.²

11 B. Procedural Bar and Default

12 When a petitioner fails to exhaust his state court remedies and the court to which
 13 petitioner would be required to present his claims in order to satisfy the exhaustion requirement
 14 would now find the claims to be procedurally barred, there is a procedural default for purposes
 15 of federal habeas review. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). Respondent
 16 maintains grounds two through six are now procedurally barred under state law. The Court
 17 agrees.

18 RCW 10.73.090(1) provides that a petition for collateral attack on a judgment and
 19 sentence in a criminal case must be filed within one year after the judgment becomes final.

20 2 Respondent does not address whether petitioner exhausted his state court remedies as to
 21 claims one and eight. Respondent does, however, address those claims on the merits. Because the
 22 Court may dismiss a habeas writ on the merits without addressing exhaustion, 28 U.S.C. § 2254(b)(2),
 the Court declines to address the issue of exhaustion as to claims one and eight. Also, as respondent
 concedes petitioner appears to have exhausted his seventh ground for relief (*see* Dkt. 61 at 6), the Court
 also considers that claim on the merits.

01 Washington law also bars a petitioner from filing successive collateral challenges absent a
 02 showing of good cause. RCW 10.73.140; Wash. RAP 16.4(d). In this case, because
 03 petitioner's judgment became final in 2009, when the Court of Appeals dismissed his appeal
 04 and issued a mandate (Dkt. 16, Ex. 54), and because petitioner previously filed collateral
 05 challenges to his conviction, he is now procedurally barred from presenting his claims in state
 06 court.

07 Petitioner provides no argument in support of his apparent contention that his
 08 unexhausted claims would not be procedurally barred pursuant to RCW 10.73.090(1) and RCW
 09 10.73.140. Also, petitioner misplaces his reliance on 28 U.S.C. § 2254(b)(1)(B)(i) and (ii) as
 10 excusing his failure to exhaust. Those provisions state, respectively, that habeas relief shall
 11 not be granted unless “there is an absence of available State corrective process[]” or
 12 “circumstances exist that render such process ineffective to exhaust the remedies available in
 13 the courts of the State.” § 2254(b)(1)(B)(i), (ii). *See also Duckworth v. Serrano*, 454 U.S. 1,
 14 3 (1981) (“An exception is made [to the exhaustion requirement] only if there is no opportunity
 15 to obtain redress in state court or if the corrective process is so clearly deficient as to render
 16 futile any effort to obtain relief.”) However, the absence or ineffectiveness of a state remedy is
 17 not relevant in the event of a procedural default. *Smith v. Baldwin*, 510 F.3d 1127, 1138-39
 18 (9th Cir. 2007). That is, when a prisoner fails to exhaust his federal claims in state court and
 19 the state court would now find the claims barred under applicable state rules, the claims are
 20 technically exhausted. *Id.* (citing *Coleman*, 501 U.S. at 732 (“A habeas petitioner who has
 21 defaulted his federal claims in state court meets the technical requirements for exhaustion; there
 22 are no state remedies any longer ‘available’ to him.”)); *Phillips v. Woodford*, 267 F.3d 966, 974

01 (9th Cir. 2001) (where state courts would not afford petitioner a hearing on the merits of his
 02 unexhausted claims, claims are “none-the-less exhausted because ‘a return to state court for
 03 exhaustion would be futile.’”). The relevant inquiry under these circumstances is whether the
 04 procedural default can be excused, *Smith*, 510 F.3d at 1139, which is discussed below.

05 C. Exceptions to Procedural Default

06 When a state prisoner defaults on his federal claims in state court, pursuant to an
 07 independent and adequate state procedural rule, federal habeas review of the claims is barred
 08 unless the prisoner can demonstrate cause and prejudice, or demonstrate that failure to consider
 09 the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750;
 10 *Harris v. Reed*, 489 U.S. 255, 263 (1989). To establish “cause,” petitioner must show that
 11 some objective factor external to the defense prevented him from complying with the state’s
 12 procedural rule. *Coleman*, 501 U.S. at 753 (citing *Murray v. Carrier*, 477 U.S. 478, 488
 13 (1986)). To show “prejudice,” the petitioner “must shoulder the burden of showing, not
 14 merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his
 15 *actual* and substantial disadvantage, infecting his entire trial with error of constitutional
 16 dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). Only
 17 in an “extraordinary case” may the habeas court grant the writ without a showing of cause or
 18 prejudice to correct a “fundamental miscarriage of justice” where a constitutional violation has
 19 resulted in the conviction of a defendant who is actually innocent. *Murray*, 477 U.S. at
 20 495-96.

21 ///

22 ///

01 Petitioner fails to set forth any basis for excusing his procedural default.³ “Cause
 02 ‘must be something external to the petitioner, something that cannot fairly be attributed to
 03 him.’” *Boyd v. Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998) (quoting *Coleman*, 501 U.S. at
 04 753). Cause may be found, for example, where the record shows an appellate counsel failed to
 05 provide effective assistance of counsel, or where petitioner “was denied representation by
 06 counsel on appeal altogether[.]” *United States v. Skurdal*, 341 F.3d 921, 926 (9th Cir. 2003)
 07 (cited sources omitted).

08 Here, as discussed below, petitioner fails to demonstrate he was denied counsel on
 09 appeal or that the assistance provided by counsel on appeal in constructing the record was
 10 ineffective. Instead, the record shows petitioner chose to proceed pro se on appeal, repeatedly
 11 failed to submit an opening brief on direct appeal despite being granted numerous extensions of
 12 time in which to do so, and failed to pursue any substantive claims in either a direct appeal or
 13 collateral proceeding despite the fact that an extensive record was compiled for that purpose by
 14 appointed counsel. Neither the mere fact that petitioner was proceeding pro se, nor the fact
 15 that he remained unsatisfied with the record compiled by counsel demonstrates it was some
 16 external factor, rather than petitioner’s own decisions and inaction, that prevented his
 17 compliance with state procedural rules. *See, e.g., Boyd*, 147 F.3d at 1126-27 (“Here, the cause
 18 of Boyd’s procedural default is his insistence on having a transcript before filing a notice of
 19

20 3 Petitioner maintains the claims in grounds two through six are cognizable in federal court
 21 without a showing of cause and prejudice because respondent “cannot assert default.” (Dkt. 72 at 11.)
 22 This argument fails for the reasons stated above. Petitioner also maintains he can show cause and
 23 prejudice “if necessary[.]” (*See id.*) However, as this matter has now been pending in this Court for
 well over two years and petitioner was provided ample opportunity to address this issue, the undersigned
 recommends the Court find an absence of cause and prejudice excusing the procedural default for the
 reasons stated herein.

01 appeal. Boyd's unfamiliarity with state appellate rules is no excuse: he rebuffed legal assistance
 02 three times and willingly proceeded in state court pro se. 'When a pro se petitioner is able to
 03 apply for post-conviction relief to a state court, the petitioner must be held accountable for
 04 failure to timely pursue his remedy to the state supreme court.' *Hughes v. Idaho State Bd. of*
 05 *Corrections*, 800 F.2d 905, 909 (9th Cir. 1986). Boyd cannot establish any reason, external to
 06 him, to excuse his procedural default.")

07 Because petitioner has not met his burden of demonstrating cause for his procedural
 08 default, this Court need not determine whether petitioner carried his burden of showing actual
 09 prejudice. *Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1448 (9th Cir. 1989) (citing *Smith v.*
 10 *Murray*, 477 U.S. 527, 533 (1986)). In addition, petitioner makes no colorable showing of
 11 actual innocence. Petitioner, therefore, fails to demonstrate that his second, third, fourth, fifth,
 12 and sixth grounds for relief are eligible for review in these federal habeas proceedings.

13 D. Mixed Petitions

14 The Court additionally observes that there is no basis for construing petitioner's habeas
 15 petition as "mixed." A mixed petition includes both exhausted and unexhausted claims. *See*
 16 *Rose v. Lundy*, 455 U.S. 509, 510 (1982). When faced with a mixed petition, a district court
 17 may (1) dismiss the petition without prejudice to allow the petitioner to present his unexhausted
 18 claims to the state court and then return to federal court to file a new petition; (2) stay the
 19 petition to allow the petitioner to present his unexhausted claims to state court and then return to
 20 federal court for review of a perfected petition; or (3) allow the petitioner to delete the
 21 unexhausted claims and proceed with the exhausted claims. *See Rhines v. Weber*, 544 U.S.
 22 269, 274-79 (2005).

01 In this case, as discussed above, petitioner's claims are either exhausted or technically
 02 exhausted. *See Coleman*, 501 U.S. at 732. Petitioner does not, therefore, present a mixed
 03 petition. *See, e.g., Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993) ("A petition containing
 04 unexhausted but procedurally barred claims in addition to exhausted claims, is not a mixed
 05 petition requiring dismissal[.] Although the unexhausted claims may not have been presented
 06 to the highest state court, exhaustion is not possible because the state court would find the
 07 claims procedurally defaulted.")

08 E. Merits Review

09 Federal habeas corpus relief is available only to a person "in custody in violation of the
 10 Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A habeas corpus
 11 petition may be granted with respect to any claim adjudicated on the merits in state court only if
 12 the state court's decision was contrary to or involved an unreasonable application of clearly
 13 established federal law, as determined by the United States Supreme Court. § 2254(d)(1). In
 14 addition, a habeas corpus petition may be granted if the state court decision was based on an
 15 unreasonable determination of the facts in light of the evidence presented in the state court
 16 proceeding. § 2254(d)(2).

17 Under the "contrary to" clause of § 2254(d)(1), a federal habeas court may grant the writ
 18 only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a
 19 question of law, or if the state court decides a case differently than the Supreme Court has on a
 20 set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).
 21 Under the "unreasonable application" clause, a federal habeas court may grant the writ only if
 22 the state court identifies the correct governing legal principle from the Supreme Court's

01 decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at
 02 412-13. The Supreme Court has made clear that a state court's decision may be overturned
 03 only if the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 69
 04 (2003).

05 In considering a habeas petition, this Court's review "is limited to the record that was
 06 before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, ___ U.S.
 07 ___, 131 S. Ct. 1388, 1398-1400, 1415 (2011). If a habeas petitioner challenges the
 08 determination of a factual issue by a state court, such determination shall be presumed correct,
 09 and the applicant has the burden of rebutting the presumption of correctness with clear and
 10 convincing evidence. 28 U.S.C. § 2254(e)(1). Also, federal habeas relief is not available for
 11 errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-72 (1991) ("[I]t is not the province of
 12 a federal habeas court to reexamine state-court determinations on state-law questions.")

13 1. Grounds One and Eight:

14 In his first ground for relief, petitioner argues a violation of his constitutional rights
 15 through the failure to provide him with a full and fair opportunity to litigate his federal claims
 16 and properly exhaust his state remedies. (Dkt. 69 at 5.) He notes that none of his claims were
 17 addressed on the merits on direct appeal and the absence of rulings on claims raised by
 18 post-conviction motion. (*Id.*) Petitioner explains that the "substance" of this claim is an
 19 absence of an "adequate & effective corrective judicial process to raise [and] exhaust his federal
 20 claims." (Dkt. 72 at 18 (citing 28 U.S.C. § 2254(b)(1)(B)(i) and (ii).) In his eighth ground for
 21 relief, petitioner alleges he was deprived of his right to pursue his direct appeal, pointing to
 22 issues associated with his efforts to obtain a transcript and clerk's papers in perfecting the

01 record for appeal. (Dkt. 69 at 15.)

02 To the extent petitioner's first ground for relief raises arguments associated with
 03 exhaustion and procedural bar/default, the Court addressed such arguments above. The Court
 04 otherwise agrees with respondent that, although phrased differently, the claims raised in
 05 petitioner's first and eighth grounds for relief are substantively the same as those raised in
 06 petitioner's original petition. That is, petitioner again argues a violation of his rights to due
 07 process and equal protection through his inability to pursue his claims in state court, both on
 08 direct appeal and in collateral proceedings. (*See* Dkt. 4.) As so construed, the Court further
 09 agrees with respondent that petitioner fails to demonstrate any error in the Court's prior
 10 consideration of these claims.

11 As stated in the first Report and Recommendation:

12 In his first ground for relief, petitioner argues the inadequacy of the
 13 record on direct appeal and the dismissal of that appeal resulted in his inability to
 14 prosecute his appeal in violation of his constitutional rights to due process and
 15 equal protection. He also appears to assert a related ineffective assistance of
 16 counsel claim. However, the Court finds no basis for habeas relief.

17 If state law provides criminal defendants a right to appeal, "the
 18 procedures used in deciding appeals must comport with the demands of the Due
 19 Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469
 20 U.S. 387, 393 (1985). An appellate process satisfies those constitutional
 21 concerns by providing a criminal appellant the "minimum safeguards
 22 necessary" to make the appeal "adequate and effective[.]" *Smith v. Robbins*,
 528 U.S. 259, 276-77 (2000) (quoted sources and internal quotation marks
 omitted). States must, therefore, afford indigent defendants adequate and
 effective appellate review. *Id.* at 276. "A State's procedure provides such
 review so long as it reasonably ensures that an indigent's appeal will be resolved
 in a way that is related to the merit of that appeal." *Id.*

23 A court cannot make available a trial transcript to those who can afford
 24 it, but deny transcripts to those who are indigent. *Griffin v. Illinois*, 351 U.S.
 25 12, 18-20 (1956) (plurality opinion). Further, the record on appeal must be "of

sufficient completeness” to allow the indigent appellant “proper consideration” of his claims. *Mayer v. Chicago*, 404 U.S. 189, 194 (1971) (quoted sources and internal quotation marks omitted). However, “[a] ‘record of sufficient completeness’ does not translate automatically into a complete verbatim transcript.” *Id.* Alternatives suffice so long as “they place before the appellate court an equivalent report of the events at trial from which the appellant’s contentions arise.” *Id.* (speculating that a narrative statement based on the trial judge’s minutes taken during trial, a court reporter’s untranscribed notes, or a bystander’s bill of exceptions may all be equally as good as a transcript; also observing that “part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances.”) See also *Norvell v. Illinois*, 373 U.S. 420, 423 (1963) (refusing to extend *Griffin* to a case where the transcript was unavailable due to the death of the court reporter); *Bransford v. Brown*, 806 F.2d 83, 86 (6th Cir. 1986) (noting courts have not required “a word-by-word transcript where the production of such is impossible and the failure to produce the transcript is not invidiously motivated.”)

What is impermissible under the Constitution is the total denial of a transcript to indigent defendants without explanation. *Draper v. Washington*, 372 U.S. 487, 498 (1963) (noting “State could have endeavored to show that a narrative statement or only a portion of the transcript would be adequate and available for appellate consideration”). Also, some courts require a showing of prejudice to set forth a constitutional violation. See *White v. State of Fla. Dept. of Corrections*, 939 F.2d 912, 914 (11th Cir. 1991) (agreeing with other courts that “in a federal habeas corpus case brought by a state prisoner, the absence of a perfect transcript does not violate due process absent a showing of specific prejudice.”) (citing *Bransford*, 806 F.2d 83, and *Mitchell v. Wyrick*, 698 F.2d 940, 941-42 (8th Cir. 1983)).

In this case, it is undisputed the state court file for petitioner’s direct appeal contained over seventy volumes of transcripts and over 3,000 pages of clerk’s papers. (Dkt. 46, Ex. 46 at 10, 13.) Petitioner had been appointed counsel to assist in obtaining the record and counsel determined the record was complete. (See *id.*, Ex. 48.) The state court later granted petitioner the opportunity to submit a concise list of items he believed were missing from the record and, if he did so, the opportunity for reappointment of counsel for the purpose of determining the existence of any additions to the record. (*Id.*) While petitioner appears to maintain he submitted the necessary information to the Washington Supreme Court in filing a motion for discretionary review (see Dkt. 4 at 20), it remains that the Court of Appeals determined he failed to submit the necessary information. (Dkt. 46, Ex. 46 at 6 (docket entry) and Ex. 70 (July 29, 2009 ruling by Commissioner of Court of Appeals stating that, despite the

01 May 2008 order directing petitioner to submit a list of what he believed was
 02 missing from the record: “Case never submitted anything indicating what he
 03 believed was missing from the record.”))⁴ The Court of Appeals further
 04 determined that the record was complete. (*Id.*, Ex. 70 at 1.)

05 As argued by respondent, the state court reasonably found the record on
 06 appeal sufficiently complete to allow for consideration of petitioner’s claims.
 07 Despite his continued insistence to the contrary, petitioner fails to provide
 08 support for the conclusion that further additions to the record were necessary to
 09 allow for appellate review of his claims. Instead, his arguments are speculative
 10 and insufficient to support a violation of petitioner’s constitutional rights. *See,*
 11 *e.g.*, *Scott v. Elo*, 302 F.3d 598, 604-05 (6th Cir. 2002) (speculation that a
 12 missing portion of a transcript might aid a petitioner’s claim is not sufficient to
 13 show a violation of due process).

14 Nor does petitioner demonstrate a constitutional violation through the
 15 dismissal of his appeal. Despite numerous extensions of time extending more
 16 than two years after the initial filing deadline, petitioner failed to file his opening
 17 brief and, consequently, failed to allow for the consideration of any claims on
 18 the merits.⁵ There is no basis for concluding that petitioner was denied
 19 adequate and effective appellate review by the state courts. Instead, the
 20 dismissal resulted from petitioner’s inaction.

21 Petitioner also appears to assert a related ineffective assistance of
 22 appellate counsel claim in the failure to “perfect a record of sufficient
 23 completeness” under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and
 24 *Evitts*, 469 U.S. at 397. (*See* Dkt. 4 at 24.) However, again without addressing
 25 the issue of exhaustion, the Court finds no support for such a claim. That is,
 26 petitioner fails to show either that appointed counsel’s performance fell below
 27 an objective standard of reasonableness, or that a reasonable probability exists

28 4 [Footnote from first Report and Recommendation: Petitioner correctly observes that the
 29 August 13, 2008 ruling denying review by the Washington Supreme Court stated: “Apparently, Mr.
 30 Case has since submitted a list to the Court of Appeals.” (Dkt. 46, Ex. 50.) However, as stated above,
 31 the Court of Appeals found petitioner did not submit a list. (*Id.*, Ex. 70.)]

32 5 [Footnote from first Report and Recommendation: It is worth noting that this case is quite
 33 unusual in that, given petitioner’s dissatisfaction with the record and refusal to submit an opening brief,
 34 the state courts never addressed any claims on the merits. Petitioner likewise does not here present any
 35 substantive claims relating to his conviction and sentence, and, in fact, could not do so given his failure
 36 to pursue and exhaust any such claims in the state courts. 28 U.S.C. § 2254(b)(1)(A)(“An application
 37 for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court
 38 shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the
 39 courts of the State.”).]

01 that, but for counsel's error, the result of the proceedings would have been
 02 different. *Strickland*, 466 U.S. at 687-694. Instead, petitioner's contention
 03 that the record was not sufficiently complete to allow for consideration of his
 04 claims remains speculative and unsupported.

05 For the reasons stated above, petitioner fails to show a violation of his
 06 constitutional rights as related to the record on appeal and the dismissal of that
 07 appeal. As such, his first ground for relief should be denied.
 08 ...

09 Petitioner argues in his second ground for relief that the failure of the
 10 superior court to rule on his July 2009 post-conviction motion violated his
 11 constitutional rights to due process and equal protection. However, “[s]tate
 12 collateral proceedings are not constitutionally required as an adjunct to the state
 13 criminal proceedings and serve a different and more limited purpose than either
 14 the trial or appeal.” *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). The
 15 Supreme Court has, therefore, determined there is no constitutional right to a
 16 collateral attack on a final judgment or conviction, *United States v. MacCollom*,
 17 426 U.S. 317, 323 (1976), or to the appointment of counsel in such proceedings,
 18 *Murray*, 492 U.S. at 7-10. Further, as held by the Ninth Circuit, “federal
 19 habeas relief is not available to redress alleged procedural errors in state
 20 post-conviction proceedings.” *Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir.
 21 1998) (citing *Carriger v. Stewart*, 95 F.3d 755, 763 (9th Cir. 1996), vacated on
 22 other grounds, 132 F.3d 463 (1997); *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th
 23 Cir. 1989)). See also *Villafuerte v. Stewart*, 111 F.3d 616, 632 n.7 (9th Cir.
 24 1997) (“Villafuerte also presented a separate claim that he was denied due
 25 process in his state habeas corpus proceedings. However, such claims are not
 26 addressable in a section 2254 proceeding.”) (citing *Franzen*, 877 F.2d 26).
 27 Consequently, petitioner sets forth no basis for habeas relief in his challenge to
 28 the absence of a superior court ruling on a post-conviction motion.

29
 30 (Dkt. 47 at 7-11.) Although later vacated for a different reason (see Dkt. 58), the Court issued
 31 an Order adopting the above recommendations. (Dkt. 55.)

32 Petitioner again fails to demonstrate a violation of his constitutional rights as related to
 33 his ability to pursue his claims on either direct appeal or in a post-conviction motion.
 34 Accordingly, for the same reasons previously identified and as reflected in the excerpt above,
 35 the undersigned recommends the Court deny petitioner's first and eighth grounds for relief.

01 2. Grounds Five and Six:

02 As discussed above, petitioner failed to exhaust his second, third, fourth, fifth, and sixth
 03 grounds for relief and those claims are now procedurally barred and defaulted. The Court need
 04 not, therefore, address these claims on the merits. 28 U.S.C. § 2254(b)(1)(A). However,
 05 consideration of petitioner's fifth and sixth grounds for relief, relating to the waiver of counsel
 06 prior to trial, may be instructive in relation to petitioner's seventh, exhausted ground for relief,
 07 relating to counsel on appeal. The Court, therefore, herein addresses the alternative arguments
 08 presented by respondent in relation to claims five and six.

09 The Sixth Amendment affords a criminal defendant both the right to counsel at trial and
 10 the right to self-representation at trial. *Faretta v. California*, 422 U.S. 806, 807 (1975). A
 11 defendant who elects to forgo representation at trial must do so knowingly and intelligently.
 12 *Id.* at 835 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)). The Supreme Court has
 13 described a waiver of counsel as intelligent "when the defendant 'knows what he is doing and
 14 his choice is made with eyes open.'" *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (citing *Adams v.*
 15 *McCann*, 317 U.S. 269, 279 (1942)). He must, therefore, be "made aware of the nature of the
 16 charges against him, the possible penalties, and the risks of self-representation." *United States*
 17 *v. Mendez-Sanchez*, 563 F.3d 935, 944-45 (9th Cir. 2009).

18 While it is clear a defendant must be warned of the dangers and disadvantages of
 19 self-representation before being permitted to proceed pro se at trial, the Supreme Court has not
 20 "prescribed any formula or script to be read to a defendant who states that he elects to proceed
 21 without counsel." *Tovar*, 541 U.S. at 88. The information necessary for a defendant to make
 22 an intelligent waiver will depend on the facts and circumstances of each case. *Id.* As stated

01 by the Supreme Court: “[T]he law ordinarily considers a waiver knowing, intelligent, and
 02 sufficiently aware if the defendant fully understands the nature of the right and how it would
 03 likely apply in general in the circumstances--even though the defendant may not know the
 04 *specific detailed* consequences of invoking it.”” *Id.* at 92 (quoting *United States v. Ruiz*, 536
 05 U.S. 622, 629 (2002) (emphasis in original)). Also, “[i]n a collateral attack on an uncounseled
 06 conviction, it is the defendant’s burden to prove that he did not competently and intelligently
 07 waive his right to the assistance of counsel.” *Id.*

08 The Ninth Circuit has interpreted *Faretta* to also require that a defendant’s request for
 09 self-representation be unequivocal. *Mendez-Sanchez*, 563 F.3d at 945-46. *See also Stenson*
 10 *v. Lambert*, 504 F.3d 873, 882 (9th Cir. 2007) (“We also have held that *Faretta* requires a
 11 defendant’s request for self-representation be unequivocal, timely, and not for purposes of
 12 delay.”) (citing *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004)). This
 13 requirement both avoids the inadvertent waiver of counsel “through occasional musings on the
 14 benefit of self-representation[,]” and prevents manipulation of the mutually exclusive rights to
 15 counsel and self-representation by forcing a defendant to make an explicit choice. *Adams v.*
 16 *Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989).

17 In his fifth ground for relief, petitioner maintains his waiver of counsel prior to trial was
 18 not voluntary and, rather, that he was forced into a decision to proceed pro se given the
 19 ineffective assistance provided by and irreconcilable conflicts with his appointed counsel.
 20 (Dkt. 69 at 12.) He avers that the “trial court would allow no more substitution[.]” (*Id.*)
 21 Petitioner also asserts his decision to proceed pro se was not knowing, willing, or voluntary as
 22 he was not informed his decision to proceed pro se “included a forfeiture to re-invoking right to

01 counsel[.]” (*Id.*)

02 In his sixth ground for relief, petitioner avers that, “[b]efore trial, and during voir dire
 03 [he] re-invoked his right to counsel and withdrew the prior invalid Faretta waiver[,]” that his
 04 standby counsel was unprepared to resume his lead counsel role, and that the court “ordered
 05 [him] to proceed pro se or be tried in absentia.” (*Id.* at 13.) He states he was not prepared for
 06 trial and presented no defense, other than some witness cross-examination, to rebut the
 07 prosecution’s case-in-chief. (*Id.*)

08 A review of the record does not support petitioner’s contention that he was forced into
 09 the decision to proceed pro se. Indeed, the record reflects the trial judge found no deficiencies
 10 in the assistance provided by appointed counsel. (*See, e.g.*, Dkt. 65, Ex. 78 at 59-62 and Ex. 79
 11 at 33.) The trial judge also found petitioner’s behavior of filing bar complaints and lawsuits to
 12 raise the question of whether petitioner was engaging in a pattern of conduct designed to
 13 destroy his relationships with counsel. (*See id.*, Exs. 76-79.)

14 The record further shows the adequacy of the *Faretta* warnings provided to petitioner.
 15 The trial judge, on two separate occasions, engaged in colloquies with petitioner as to the
 16 waiver of counsel and the invocation of the right to self-representation. (*See id.*, Ex. 79 at
 17 21-63 and Ex. 80 at 7-48.) The trial judge noted the nature of the charges against petitioner
 18 and the possible penalties, and went into great detail as to the dangers and disadvantages of
 19 self-representation, both as a general matter and in relation to specific aspects of a trial. (*Id.*)

20 Nor is there any basis for concluding petitioner’s decision to represent himself at trial
 21 was anything other than unequivocal, voluntary, knowing, and intelligent. The trial judge did
 22 not refuse additional substitution of counsel and, in fact, specifically clarified this point when

01 prompted by petitioner. (*Id.*, Ex. 80 at 4-5.) The judge also repeatedly sought clarification as
 02 to petitioner's position in relation to counsel and self-representation, inquiring specifically into
 03 a possible equivocation in a written motion. (*Id.* at 7-15.) Petitioner confirmed he wanted to
 04 proceed pro se (*id.*), and the trial judge found petitioner's waiver of counsel knowing,
 05 intelligent, and voluntary (*id.* at 47 and Dkt. 16, Ex. 2; *see also* Dkt. 65, Ex. 79 at 62).

06 Finally, there is an absence of evidence petitioner affirmatively requested to re-invoke
 07 his right to counsel or to rescind his waiver of counsel prior to trial. The record, instead,
 08 supports the conclusion that petitioner proceeded pro se by his own choice, both at trial and
 09 long after the entry of the verdict. (*See, e.g.*, Dkt. 66, Ex. 87 (January 2007 order: "Appellant
 10 has made very clear in the litigation at the trial court level that he does not wish to be
 11 represented by counsel[.]"); Dkt. 16, Ex. 49 at 7, 14 (petitioner, in June 2008, "ardently
 12 oppos[ed]" the reappointment of counsel to address the perfection of the record and maintained
 13 such appointment violated his right to self-representation) and at Appx. 7 ("I have exercised my
 14 right to self-representation (pro se) since March 2005. I elected to prosecute my appeal as pro
 15 se and filed my first 'Notice of Appeal' in June, 2006."))

16 Moreover, even if petitioner could show he sought to re-invoke his right to counsel and
 17 withdraw his prior waiver just prior to trial, there is no basis for concluding the denial of such a
 18 request violated his constitutional rights. As an initial matter, there is no clearly established
 19 Supreme Court precedent supporting a constitutional entitlement to reappointment of counsel
 20 after a valid waiver of the right to counsel under *Farett*a. *Marshall v. Rodgers*, ____ U.S. ___,
 21 133 S.Ct. 1446, 1449 (2013); *John-Charles v. California*, 646 F.3d 1243, 1249 (9th Cir. 2011).
 22 Accordingly, a state court adjudication of this claim could not be deemed an unreasonable

01 application of clearly established federal law. *Marshall*, 133 S.Ct. at 1449-51 (reversing
 02 appellate court's decision finding trial judge violated criminal defendant's Sixth Amendment
 03 right by not appointing counsel after the defendant had executed a valid waiver of counsel and
 04 represented himself at trial, but sought and was denied appointment of counsel to file a
 05 post-conviction motion for a new trial; noting absence of any Supreme Court decision
 06 addressing criminal defendant's ability to reassert right to counsel once validly waived, and
 07 finding no basis for conclusion that the state court's approach to case was contrary to or an
 08 unreasonable application of clearly established federal law).

09 Further, "when a defendant who elected to proceed pro se later demands an attorney,
 10 there is broad consensus that, once waived, the right to counsel is no longer unqualified."
 11 *United States v. Kerr*, 752 F.3d 206, 220 (2d Cir. 2014) (citing circuit court decisions). *Accord*
 12 *John-Charles*, 646 F.3d at 1250 ("[I]t is clear that 'fairminded jurists' could conclude that there
 13 is no absolute, constitutional right to reappointment of counsel after a *Farettta* waiver.")
 14 Therefore, a court may, for example, "force a defendant to proceed pro se if his conduct is
 15 'dilatory and hinders the efficient administration of justice.'" *United States v. Thompson*, 587
 16 F.3d 1165, 1175 (9th Cir. 2009) (quoted sources omitted). *See also Menefield v. Borg*, 881
 17 F.2d 696 (9th Cir. 1989) ("There are times when the criminal justice system would be poorly
 18 served by allowing the defendant to reverse his course at the last minute and insist upon
 19 representation by counsel. When, for example, for purposes of delay, criminal defendants
 20 have sought continuances on the eve of trial, we have refused to disrupt the proceedings to
 21 accommodate their wishes.")

22 In this case, whether or not the trial judge did reject a last minute request for

01 reappointment of counsel, it is clear such rejection would have been reasonably based, at least
02 in part, on petitioner's dilatory conduct. The trial judge addressed that conduct in the July
03 2006 sentencing hearing, stating:

04 ... I don't know how many times I have remonstrated with you that all of
05 these legal motions and the like that were presented to me were putting your
06 focus off from what was upcoming, which was the factual presentations and
07 defenses that you might wish to present to the Court during the time of your trial,
08 and we ultimately wound up after three and a half years with not a single witness
09 being produced in Court for purposes of defense after significant representations
10 over the years by you about all the things you were going to do[.]”

11 (Dkt. 65, Ex. 81 at 18-19.) Noting the same behavior post-verdict in the filing of numerous
12 motions, the court denied a motion for a continuance, concluding:

13 And, I think we can go forward at this point. Whether you want to do
14 that or not, I tend to think there is some truth in the argument that you simply
15 don't want to face that, and after fighting, and fighting, and fighting, your
16 behavior during the trial was to basically cave in, basically want [standby
17 counsel] Mr. Hicks to do the work that you wouldn't even consult with him on in
18 the (inaudible) of the case.

19 So, I have some reason, based on your pattern of behavior before to think
20 that this is not a very productive exercise to entertain a motion to continue, and
21 the motion will be denied.

22 (Id. at 19-21.) Moreover, it remains that petitioner had knowingly and intelligently waived his
right to counsel and that standby counsel was available to assist him at trial.

23 With consideration of the above, as well as the circumstances as a whole surrounding
24 his association with and waiver of counsel, petitioner fails to demonstrate a violation of his
25 constitutional rights through a denial of reappointment of counsel on the eve of trial. *See, e.g.,*
26 *Thompson*, 587 F.3d at 1175-76 (finding “fair and reasonable” a trial judge’s denial of requests
27 for a continuance and reappointment counsel, made three and a half years after the initial

01 pretrial conference and on the day before trial, where denial was based on, *inter alia*, numerous
 02 continuances previously granted, the defendant's "lack of good faith," prior warnings no more
 03 continuances would be granted, and "the court's near certain belief that [defendant] would
 04 eventually ask to represent himself again in order to delay trial."; also finding relevant the fact
 05 that the defendant had been appointed standby counsel for trial and had knowingly and
 06 intelligently waived his right to counsel). For this reason, and for the reasons stated above,
 07 petitioners' fifth and sixth claims, even if not procedurally barred and defaulted, provide no
 08 basis for habeas relief.

09 3. Ground Seven:

10 In his seventh ground for relief, petitioner maintains he was deprived of his right to
 11 appeal with counsel in violation of his constitutional rights. (Dkt. 69 at 14.) He notes the
 12 absence of any appointment of counsel and the absence of a record that he knowingly,
 13 willingly, and voluntarily waived his right to appeal with counsel. Petitioner also states he
 14 "requested legal assistance, and reappointment of counsel." (*Id.*)

15 Indigent criminal defendants pursuing a first appeal are entitled as of right to the
 16 appointment of counsel. *Douglas v. California*, 372 U.S. 353, 355-57 (1963); *accord Halbert*
 17 *v. Michigan*, 545 U.S. 605, 610 (2005). While the right to counsel at trial is grounded in the
 18 Sixth Amendment, *see Strickland v. Washington*, 466 U.S. 668, 687 (1984), the right to counsel
 19 on first appeal arises under the Fourteenth Amendment, *Martinez v. Court of Appeal*, 528 U.S.
 20 152, 155 (2000).

21 As with any right, the right to counsel on appeal may be waived. *See generally United*
 22 *States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and

01 voluntarily waive many of the most fundamental protections afforded by the Constitution.”)
 02 However, while the Supreme Court has addressed the requirements for waiving the Sixth
 03 Amendment right to counsel and to invoke self-representation at trial, *see Faretta*, 422 U.S. at
 04 835, and *Tovar*, 541 U.S. at 88-94, it has not done so in relation to the Fourteenth Amendment
 05 right to counsel on appeal. *Cf. Martinez*, 528 U.S. at 159-60 (finding Sixth Amendment right
 06 to proceed without counsel at trial does not extend to grant a right to self-representation on
 07 appeal). There is, therefore, no Supreme Court decision establishing any specific procedure
 08 that must be followed before allowing a criminal defendant on first appeal to waive counsel and
 09 proceed pro se on appeal.

10 Petitioner maintains a constitutional violation through the failure to make a record that
 11 he knowingly, willingly, and voluntarily waived his right to appeal with counsel. However,
 12 given the absence of any clearly established federal law requiring any such finding, the state
 13 court adjudication of this claim cannot be deemed an unreasonable application of clearly
 14 established federal law. *See Marshall*, 133 S.Ct. at 1449-51. Moreover, even with
 15 consideration of the clearly established federal law associated with the waiver of counsel at
 16 trial, petitioner’s seventh ground for relief lacks merit for the reasons set forth below.

17 As discussed above, petitioner was properly advised as to his waiver of counsel and
 18 decision to proceed pro se at trial, and demonstrates no error in the trial court’s conclusion that
 19 his waiver of counsel and invocation of his right to self-representation was unequivocal,
 20 voluntary, intelligent, and knowing. Following his conviction, the trial judge advised
 21 petitioner of his right to counsel on appeal and petitioner chose to file his notice of appeal pro
 22 se. (Dkt. 65, Ex. 81 at 53-54 and Dkt. 66, Ex. 83.) A month later, the trial judge again

01 advised petitioner of his right to counsel on appeal, adding that petitioner “might be well served
 02 by appellate counsel” in compiling the record for the appeal. (Dkt. 65, Ex. 82 at 14-16.) The
 03 prosecutor also noted petitioner’s right to counsel on appeal. (*Id.*) Rather than requesting
 04 counsel, petitioner reaffirmed his intention to proceed pro se in filing various documents. (See
 05 Dkt. 66, Exs. 84-85 and Dkt. 16, Ex. 32.)

06 The state court continued to advise petitioner of his right to counsel. Six months after
 07 petitioner filed his notice of appeal pro se, the state court noted petitioner had made his desire to
 08 proceed without counsel “very clear[,]” that he had omitted appointment of counsel from the
 09 order of indigency he prepared for the court’s signature, despite the fact that he “qualifies for
 10 appointed counsel on appeal,” and that the court wanted to “respect his wishes as much as
 11 possible” despite the fact that petitioner had “been advised that an appellant does not have a
 12 constitutional right to represent himself on appeal[.]” (Dkt. 66, Ex. 87.) Again, petitioner
 13 failed to request or give any indication he desired the appointment of counsel. Indeed, some
 14 two years after petitioner had filed his notice of appeal, he not only reconfirmed his desire to
 15 proceed pro se, he “ardently oppos[ed]” the reappointment of counsel for the limited purpose of
 16 addressing the perfection of the record for appeal, and maintained such appointment violated
 17 his rights. (Dkt. 16, Ex. 49; *see also id.*, Appx. 7 (“I have exercised my right to
 18 self-representation (pro se) since March 2005. I elected to prosecute my appeal as pro se and
 19 filed my first ‘Notice of Appeal’ in June, 2006.”))

20 It was not until March 2011, almost five years after petitioner filed his appeal and more
 21 than a year after the state court issued its mandate following the dismissal of that appeal, that
 22 petitioner raised the issue as to the absence of a colloquy establishing his waiver of counsel on

01 appeal. (Dkt. 16, Ex. 59.) Even then, however, petitioner continued to maintain a
 02 “guaranteed right to self-representation on appeal.” (*Id.* at 2, 4-5, 11-13.)

03 Petitioner provides no support for his assertion that he requested the appointment of
 04 counsel on appeal. (*See* Dkt. 69 at 14.) Instead, the facts and circumstances in this case show
 05 petitioner knowingly and intelligently waived his right to counsel on appeal and elected to
 06 proceed pro se. *See, e.g., United States v. Feldman*, 830 F.2d 134, 135-36 (9th Cir. 1987)
 07 (record plainly showed petitioner who appeared pro se throughout his trial and appeal and
 08 repeatedly “referred to himself as ‘counsel of record[]’” on appeal, “knowingly and
 09 intelligently waived his right to counsel and chose to appear pro se.”). In light of those facts
 10 and circumstances, and with consideration of the record as a whole, petitioner’s reliance on the
 11 absence of an express colloquy or state court finding as to waiver on appeal is unavailing. Cf.
 12 *Hendricks v. Zenon*, 993 F.2d 664, 670 (9th Cir. 1994) (noting rare instances, involving ““an
 13 unusual fact situation in which the background and experience of the defendant in legal matters
 14 was apparent from the record[,]” in which the failure to discuss the elements required for a
 15 finding of a valid waiver of counsel at trial would ““not necessitate automatic reversal when the
 16 record as a whole reveals a knowing and intelligent waiver.””) (quoting *United States v.*
 17 *Balough*, 820 F.2d 1485 (9th Cir. 1987)).

18 Petitioner, in sum, fails to demonstrate that the state court adjudication of his claim as to
 19 the deprivation of counsel on appeal was an unreasonable application of clearly established
 20 federal law. As such, his seventh ground for relief should be denied.

21 **CONCLUSION**

22 For the reasons discussed above, the Court recommends that petitioner’s amended

01 habeas petition (Dkt. 69) be DENIED, and this case DISMISSED. An evidentiary hearing is
02 not required as the record conclusively shows that petitioner is not entitled to relief.
03 Additionally, because petitioner has not made “a substantial showing of the denial of a
04 constitutional right[]” 28 U.S.C. § 2253(c)(2), the Court concludes that he is not entitled to a
05 certificate of appealability with respect to his claims. *See Miller-El v. Cockrell*, 537 U.S. 322,
06 327 (2003) (a petitioner satisfies this standard “by demonstrating that jurists of reason could
07 disagree with the district court’s resolution of his constitutional claims or that jurists could
08 conclude the issues presented are adequate to deserve encouragement to proceed further.”) A
09 proposed Order accompanies this Report and Recommendation.

10 DATED this 12th day of August, 2014.

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Mary Alice Theiler
Chief United States Magistrate Judge

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